UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DC-3 ENTERTAINMENT, LLLP, a Florida Limited Liability Limited Partnership,

Plaintiff and Counterclaim Defendant,

v.

JOHN GALT ENTERTAINMENT, INC., a California corporation; DAVID KERSHENBAUM and TIMMI DEROSA KERSHENBAUM, husband and wife and the marital community composed thereof,

Defendants and Counterclaim Plaintiffs.

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JOHN GALT ENTERTAINMENT, INC., a California corporation; DAVID KERSHENBAUM and TIMMI DEROSA KERSHENBAUM, husband and wife and the marital community composed thereof,

Third-Party Plaintiffs,

v.

JONATHAN PHELPS and ESTHER PHELPS, husband and wife and the marital community composed thereof,

Third-Party Defendants.

CASE NO. C04-2374C

ORDER

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 23). The Court has considered the papers submitted by the parties and determined that oral argument is not necessary. The Court hereby finds and rules as follows.

**I. BACKGROUND**

The undisputed facts are as follows. In May 2002, Defendants David and Timmi DeRosa Kershenbaum, through their record publishing company John Galt Entertainment, Inc. ("John Galt"), contracted with aspiring recording artist Brian Judah to develop his first seven records. The written production agreement provided that David Kershenbaum would produce the records. On July 8, 2003, John Galt assigned all of its rights in and to its May 2002 production agreement with Mr. Judah to DC-3 Entertainment ("DC-3"). Among other things, the assignment guaranteed that DC-3 would hire David Kershenbaum as the sole producer of Mr. Judah's first album. That same day, Mr. Judah signed a recording contract with DC-3, through its CEO, Jonathan Phelps. Production began on Mr. Judah's debut album in September 2003.

In October 2003, the parties orally agreed that DC-3 would hire the Kershenbaums to develop and produce other artists for DC-3, that they would be made co-presidents of DC-3, and that they would receive a salary of $83,333.33 a month, on a month to month basis. The parties never reduced this agreement to writing, however, DC-3 did pay the Kershenbaums' salary until September 2004 when the relationship ended. Plaintiff DC-3 subsequently filed suit against Defendants alleging breach of contract and related claims. Defendants counterclaimed for breach of contract and discrimination on the basis of religion and sex.

Plaintiff DC-3 now moves for partial summary judgment on its claim for a declaratory judgment. Specifically, Plaintiff requests the Court issue a judgment stating that the sole producer guarantee in the July 2003 Assignment was displaced by new obligations and consideration in the parties' October 2003 agreement, and that DC-3 has the right to re-record, complete and release the first Brian Judah album without the producer services or any other participation of David Kershenbaum, and without a producer

credit to David Kershenbaum.

**II. ANALYSIS**

Courts have discretionary authority to grant declaratory relief under the Declaratory Judgment Act. 28 U.S.C. § 2201(a). Actions for such relief must present a real and substantial controversy between parties having adverse legal interests, and the dispute must be definite and concrete. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The "substantial controversy" must be of sufficient immediacy and reality to warrant a declaratory judgment. *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The parties do not dispute that the case at bar satisfies the "substantial controversy" requirement and that the Declaratory Judgment Act applies. The Court is further satisfied that Plaintiff is not simply seeking an advisory opinion as to the parties' legal rights and obligations. A discussion of the merits is warranted.

Declaratory judgment actions may be addressed within the context of a summary judgment motion. *See Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 670 (9th Cir. 2003). Rule 56 of the Federal Rules of Civil Procedure governs summary judgment motions, and provides in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether an issue of fact exists, the court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. *Anderson*, 477 U.S. at 248. The moving party bears the burden of showing that there is no evidence which supports an element essential to the non-movant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Plaintiff argues that the Court should grant summary judgment on its motion for declaratory

judgment and find that DC-3 may complete Mr. Judah's first album without David Kershenbaum's production services and without giving him producer credit. Plaintiff's motion is loosely based on three alternate arguments: (1) that David Kershenbaum's sole producer guarantee was extinguished; (2) that the end of the parties' relationship terminated Plaintiff's obligation to use David Kershenbaum's producer services; and (3) any obligation to use his producer services cannot be enforced by specific performance. The Court will address each argument in turn.

A. Contract by Novation

Plaintiff first argues that the sole producer guarantee embodied in the July 2003 assignment was extinguished by the parties' October 2003 oral agreement which was intended to represent a contract by novation. A contract by novation is "the substitution of a new obligation for an old one between the same parties with intent to displace the old obligation with the new." *MacPherson v. Franco*, 208 P.2d 641, 642 (Wash. 1949) (internal quotations omitted). A novation exists upon (1) a mutual agreement, (2) among all parties concerned, (3) for the discharge of a valid existing obligation, (4) by the substitution of a new valid obligation or substitution of one party for another. *Fay Corp. v. Bat Holdings I, Inc.*, 646 F. Supp. 946, 950 (W.D. Wash. 1986).

Viewing the facts in the light most favorable to the non-moving party, the Court must conclude that the terms and scope of the October 2003 agreement are in dispute. The parties agree that they entered into an oral agreement in October 2003. (Am. Compl. ¶ 17, Answer ¶ 17.) They also agree that DC-3 made monthly payments of $83,333.33 to the Kershenbaums that, in sum, totaled $1 million. (Am. Compl. ¶ 24, Answer ¶ 24.) What the parties do not agree on is whether the oral agreement discharged their valid existing obligations under the July 2003 assignment. For example, Jonathan Phelps declares "[f]ollowing our new agreement with the Kershenbaums in October 2003, David Kershenbaum continued to work on Brian Judah's album but there was no agreement under this October 2003 contract that DC-3 would guarantee that David would produce Brian's first album." (Phelps Decl. ¶ 21.) David Kershenbaum, however, declares "the co-presidency had no bearing on my commitment to produce the

Judah album as set forth in the July 2003 assignment" (Kershenbaum Decl. ¶ 13) and "[a]s a result of the October 2003 meeting, two agreements now existed" (*Id*. ¶ 14). At this stage in the litigation the Court must assume that David Kershenbaum's declaration is truthful. *See Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987). These declarations, therefore, strike at the heart of the mutuality necessary for a contract by novation. Although Plaintiff's failure to pay the Kershenbaums $50,000 for mixing as required by the July 2003 assignment, combined with the payment of a month to month salary pursuant to the October 2003 agreement make it possible to infer that the oral agreement supercedes the assignment, such an inference, without more, does not convince the Court that the parties mutually agreed to the substitution of a new obligation.

Moreover, the existence of other disputed terms arising from the October 2003 oral agreement (*cf*. Phelps Decl. ¶ 17 *with* Kershenbaum Decl. ¶ 11), while not fatal, certainly does not bolster Plaintiff's argument that the contract term at issue here - that David Kershenbaum was to act as sole producer - was, as a matter of law, extinguished by the new compensation arrangements in the October 2003 oral agreement. Particularly since David Kershenbaum did in fact continue to act as the sole producer of Brian Judah's debut album for another year. *See also Malanca v. Falstaff Brewing Co.*, 694 F.2d 182, 184 (9th Cir. 1982) (indicating that interpretation of an oral contract may rest on credibility judgments by the trier of fact). Thus, the Court finds that a genuine issue of material fact exists regarding the characterization of the October 2003 oral agreement. Summary judgment is not appropriate.

B. Termination of Relationship

Plaintiff next argues that the end of the parties' relationship terminated any obligation to use David Kershenbaum's producer services. This argument appears to be based on a theory of contract rescission, and proposes that by allowing for the termination of the October 2003 agreement for any reason and by providing for a "severance package" for the Kershenbaums upon termination, the parties implicitly agreed that if the relationship ended, both the October 2003 agreement and the July 2003 assignment would be terminated. Because there is an issue of fact as to the intent of the parties in

reaching the October 2003 oral agreement, and as to whether one or both agreements govern the parties' relationship, the Court finds it is not able to address this argument. Whether Plaintiff has been freed from any legal obligation to abide by the sole producer guarantee is an issue of fact for trial.

C. Specific Performance

Finally, Plaintiff argues that even if the sole producer guarantee of the July 2003 assignment survived, Defendants cannot enforce such a guarantee by specific performance. In denying summary judgment, the Court makes no determination regarding Mr. Kershenbaum's legal right to produce Mr. Judah's first album. However, even if the Court ultimately finds Mr. Kershenbaum has this production right, specific performance will not be an available remedy. *See Rutland Marble Co. v. Ripley*, 77 U.S. 339, 358 (1870) (finding specific performance of a contract will not be decreed where the duties to be performed are continuous, involve the exercise of skill, personal labor and cultivated judgment); *Solinsky v. McPherson*, 45 F.2d 778, 780 (9th Cir. 1930) (holding specific performance is inapplicable to disputes over personal service contracts); Restatement (First) of Contracts § 379 (1932) (noting "the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone."). Although Defendants make a passing reference to Plaintiff's specific performance argument by suggesting that the proper remedy here would be to enjoin Plaintiff from proceeding with the production of Mr. Judah's debut album without David Kershenbaum's producer services, this mere assertion does nothing to address the merits of Plaintiff's argument. The Court cannot, as a matter of law, order feuding parties to work together to produce an album.

For the aforementioned reasons, Plaintiff's Motion for Partial Summary Judgment is hereby GRANTED in the part and DENIED in part.

SO ORDERED this 20th day of May, 2005.

UNITED STATES DISTRICT JUDGE